COUNTY OF MONROE
NEW YORK SUPREME COURT

GAY ALLIANCE OF GENESEE VALLEY, INC.

Plaintiff,

vs.

INDEX NO. 8872/91
JUSTICE ANDREW SIRACUSE

CITY ASSESSOR,
CITY OF ROCHESTER, NEW YORK,

Defendant.

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF ITS MOTIONS FOR SUMMARY JUDGMENT AND TO AMEND ITS COMPLAINT

ELLEN M. YACKNIN, ESQ.
80 Highland Avenue
Rochester, NY 14620
(716) 256-0508
day: 454-6500

SUSAN ANN SILVERSTEIN, ESQ.
139 Burlington Ave.
Rochester, NY 14619
(716) 464-9555
DAY: 325-2520

Attorneys for Plaintiff

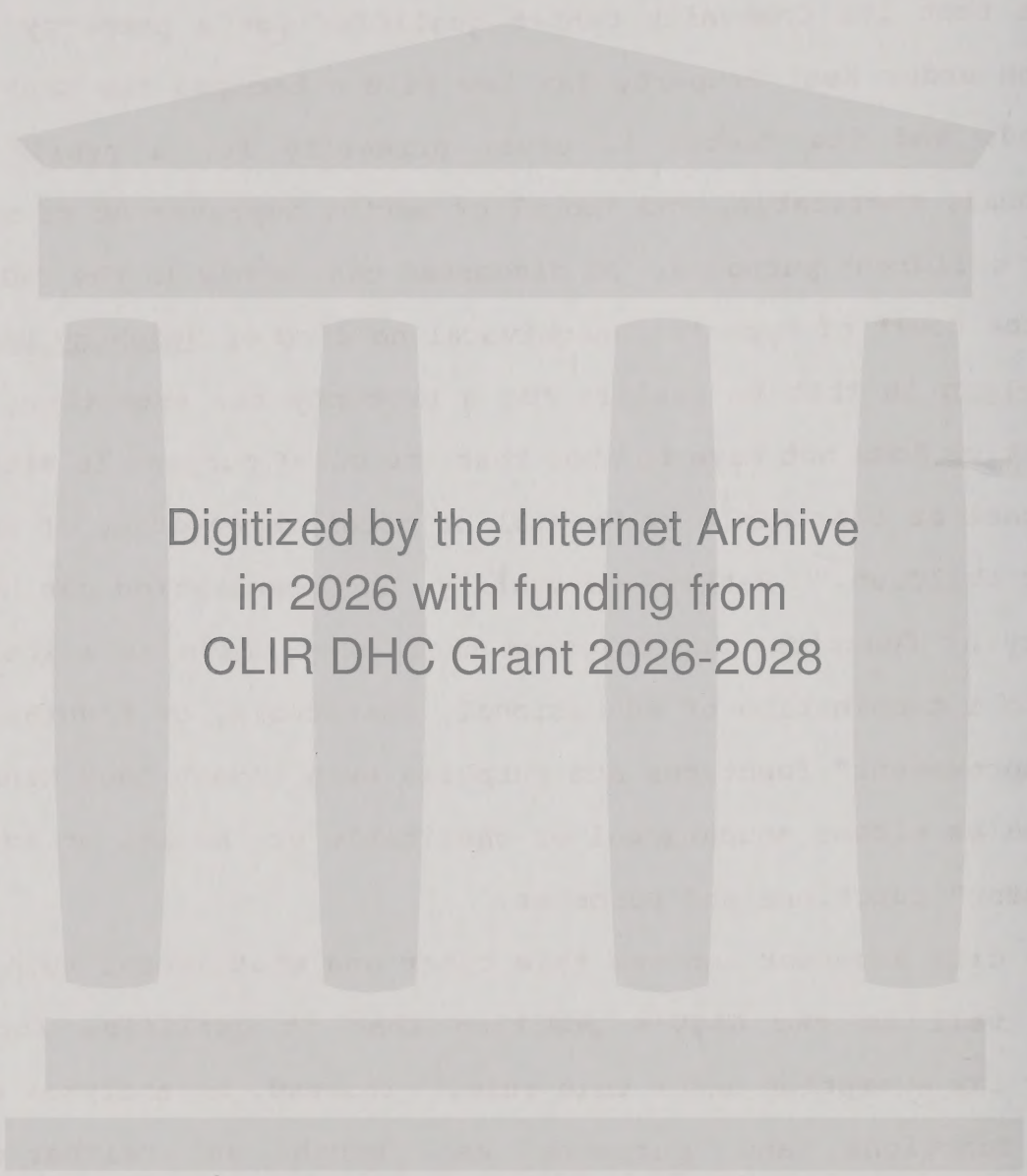
Dated: November 17, 1992

I. THE CITY ASSESSOR MISCONSTRUES APPLICABLE STATE LAW, AND RELIES ON HIS MISCONSTRUCTION TO SUPPORT HIS ILLEGAL DENIAL OF PLAINTIFF'S REQUEST FOR A PROPERTY TAX EXEMPTION UNDER REAL PROPERTY TAX LAW §420-a.

In its Brief, the Gay Alliance of Genesee Valley [GAGV] contends that its Community Center qualifies for a property tax exemption under Real Property Tax Law §420-a because the GAGV is organized, and its Center is used, primarily for a hybrid of educational, charitable, and "moral or mental improvement of men, women or children" purposes. As discussed thoroughly in the GAGV's Brief, the Court of Appeals' unequivocal holding of Symphony Space v. Tishelman is that to qualify for a property tax exemption, an organization does not have to show that its chief purpose is **either** educational **or** charitable **or** "mental or moral improvement of men, women or children." Rather, to qualify, an organization can have a variety of functions and purposes that, when taken as a whole, amount to a combination of educational, charitable, or "mental or moral improvement" functions and purposes even though they cannot be pegged as **either** educational **or** charitable **or** "mental or moral improvement" functions and purposes.

The City Assessor ignores this clear and unequivocal rule of law, as well as the GAGV's position that it qualifies for a property tax exemption under this rule.[1] Instead, he analyzes the GAGV's functions and purposes as though an "either/or"

[1] The City Assessor both disregards and misstates the GAGV's argument when he asserts, "[T]he GAGV asks for exemption **either** as an "'educational'" organization, a "'charitable organization,'" **or** a "'moral or mental improvement'" organization." (Emphasis added.) Defendant's Brief, p. 1.



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qualification test controls the outcome of this case, and concludes that the GAGV's purposes and functions fail his "either/or" test.

Disregarding the Symphony Space holding that explicitly rejects an "either/or" test, the City Assessor argues first that the Gay Alliance is not primarily an educational organization, and concludes that the GAGV is not entitled to a property tax exemption under the "educational" criterion. See City Assessor's Brief, pp. 1-6.[2] Then, he argues that the Gay Alliance is not primarily a charitable organization, and concludes that the GAGV is not entitled to a property tax exemption under the "charitable" criterion. See City Assessor's Brief, pp. 6-11. Finally, he argues that the Gay Alliance is not primarily a "moral or mental improvement" organization, and concludes that the GAGV is not entitled to a property tax exemption under the "moral or mental improvement" criterion. See City Assessor's Brief, pp. 11-12.

This analysis is both academic and irrelevant to this case because the GAGV does not assert that it is either primarily an educational organization, or primarily a charitable organization, or primarily a "mental or moral improvement" organization. Rather, the GAGV maintains that its primary functions and purposes

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[2] Defendant's attorney states that, "in [her] opinion," the Court's decisions in Symphony Space and New York Botanical Gardens v. Town of Washington, 55 NY2d 33 (1983), "should properly be treated as resting on "'educational'" grounds." Defendant's Brief, p. 12. However, those decisions expressly rejected this conclusion. Accordingly, in light of the Court of Appeals conclusions to the contrary, the personal opinion of defendant's attorney in this regard is irrelevant.

encompass a combination of educational, charitable, and "moral or mental improvement" purposes that, in combination, entitle it to a property tax exemption. The City Assessor fails to address, let alone rebut, this contention. His failure to address this point is indicative of his inability to refute plaintiff's entitlement to a property tax exemption under this analysis. See Plaintiff's Brief, pp. 7-15.

Furthermore, in concluding that the GAGV fails his legally deficient "either/or" test, the City Assessor flagrantly misinterprets case law on which he relies. In fact, no case cited by the City Assessor undermines the GAGV's contention that it is entitled to a property tax exemption under Real Property Tax Law [RPTL] §420-a.

For example, the City Assessor insists that under RPTL §420-a, the essential attribute of a "charitable" organization is that it must provide "a flow of monetary benefits" to "needy" persons who have a "lack of money." Defendant's Brief, p. 8. To support this proposition, he cites Valeria Home, Inc. v. Cook, 22 NY2d 388 (1968), and Presbyterian Residence Center Corp. v. Wagner, 66 AD2d 998 (4th Dep't 1978), aff'd, 48 NY2d 885 (1979), describing them as "[Two] cases [that] have stated that a residential facility for middle-income persons, not targeted to lower-income persons, could not qualify as 'charitable.'" Defendant's Brief, p. 8. In neither case, however, does the court refer to, let alone rely on, the wealth or poverty of the organization's intended beneficiaries as a basis to deny it a property tax exemption.

In Valeria Home, the New York Court of Appeals observed that the property in question included 19 buildings, tennis, bocci, volleyball and shuffleboard courts, bicycle, walking, and hiking trails, a lake with rowboats and canoes, a toboggan slide, swimming pool, archery range, nine-hole pitch and putt golf course, and indoor recreational and social facilities. Further, at oral argument, Valeria Home's counsel conceded that the Home was operated "'principally and primarily as a recreation establishment,'" that its convalescent aspect was quite "'incidental,'" and that Valeria Home operated as a "resort hotel." 22 NY2d at 391, 392. Finally, the Court found that few people, if any, at Valeria Home went there for convalescence. 22 NY2d at 393.

The Court's conclusion that Valeria Home was not a "charitable" organization was based on the facts in the Record and counsel's admissions that demonstrated that Valeria Home was a recreational and social "resort hotel," rather than a place for convalescence. Contrary to the City Assessor's declaration, the Court neither expressly nor tacitly concluded that Valeria Home's failure to provide a "flow of monetary benefits" to "needy persons" rendered it a non-charitable organization.

Similarly, despite the City Assessor's assertion, the court in Presbyterian Residence Center did not suggest that the fact that "needy persons" were not the intended beneficiaries of the corporation's activities was its basis for determining that the corporation was not a charitable organization for property tax

exemption purposes. Rather, it found that:

> The apartment complex ... is indistinguishable from a commercial apartment complex having appurtenant recreational facilities except that it houses elderly tenants, is designed and constructed with safety features and amenities appropriate to their age and includes a health facility as an integral part of the complex.

66 AD2d at 999. Thus, as in Valeria Home, the functions and purposes of the Presbyterian Residence Center, not the financial status of the organization's beneficiaries, were the determinative factors.

Symphony Space and Mohonk Trust v. Assessors, 47 NY2d 476 (1979), cited in Plaintiff's Brief but whose holdings defendant conveniently ignores, are also instructive in this regard. In Symphony Space, the intended beneficiaries of the organization included public and private schools, neighborhood groups, and the general public in their capacity as audiences, in addition to "struggling artists." 60 NY2d at 36. In Mohonk Trust, the intended beneficiaries included both wildlife students and experts and members of the public who used the land for rock climbing backpacking, camping, birdwatching and nature hikes. 47 NY2d at 481. In neither case did the Court of Appeals hint that the financial status of the organization's intended beneficiaries was relevant to an inquiry of whether the organization was "charitable" for property tax exemption purposes. In both cases, the Court of Appeals held that the organizations' functions and purposes included an assortment of charitable, educational, and moral improvement purposes that qualified them for property tax

exemptions notwithstanding the nonindigent status of some or all of their intended beneficiaries.[3] See also New York Botanical Gardens v. Town of Washington, 55 NY2d 328 (1982).

Equally flawed is the City Assessor's analysis of case law regarding the "moral or mental improvement" clause of RPTL §420-a. The City Assessor contends that the "moral or mental improvement" clause is limited to organizations such as the YMCA, YWCA, Boy Scouts, and Girl Scouts. See Defendant's Brief, pp. 11-12.[4] This limited application of the "moral or mental improvement" criterion was specifically repudiated by the New York Court of Appeals in Symphony Space.

The Court expressly rejected the proposition that the "exemption under the 'moral or mental improvement' category ... is meant to cover only YMCA types of organizations." 60 NY2d at 37. See also New York Botanical Gardens, 55 NY2d at 336; Mohonk Trust, 47 NY2d at 484; Matter of North Manursing Wildlife Sanctuary, 48 NY2d 135 (1979). Therefore, the narrowly circumscribed definition that the City Assessor would like to impose on the "mental or moral improvement" clause of RPTL §420-a has been resoundingly disavowed

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[3] Also instructive is the City Assessor's lack of any request for information to relating to the financial status of an organization's intended beneficiaries. See Exhibit D. If such information were a key factor in determining whether an organization is "charitable" for property tax exemption purposes, the City Assessor would presumably request such information in his application form.

[4] Presbyterian Residence Center Corp. v. Wagner, 66 AD2d 998 (4th Dep't. 1978), aff'd, 48 NY2d 885 (1979), quoted at length by defendant in support of this proposition, was decided several years before the proposition was expressly rejected by Symphony Space.

by the New York Court of Appeals.

II. THE CITY ASSESSOR'S CHARACTERIZATION OF THE GAGV AS PREDOMINANTLY A "SOCIAL OR RECREATIONAL" ORGANIZATION IS REPUDIATED BY THE UNCONTROVERTED RECORD.

The City Assessor attempts to portray the Gay Alliance as primarily a "social and recreational organization." See Defendant's Brief, pp. 10, 13. This conclusion is totally unsubstantiated by the uncontroverted Record.[5]

The purposes for which the Gay Alliance is organized are discussed in detail in Plaintiff's Affirmation and Brief, with numerous references to the Record. See Plaintiff's Affirmation, ¶¶11, 12; Plaintiff's Brief, pp. 2-3, 8. Of all the stated purposes for which the GAGV is organized, **none** is the development of social or recreational activities for its membership. See Petition Exhibit A, ¶6; Petition Exhibit C, ¶5; Petition Exhibit D, Answer to Question (b); Petition Exhibit G, Preamble to Constitution.

Further, the Gay Alliance does not deny that among its multitude of activities are a handful of activities that can be characterized as "social" or "recreational," such as the Saturday Night Social. See Petition Exhibit C, ¶ 12. Two of its "social" activities, however, are the GAGV's major annual fundraising activities, which provide the funds necessary for the GAGV to carry

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[5] The City Assessor does not deny the facts alleged in plaintiff's Exhibits or Affirmation submitted pursuant to CPLR §3212. Therefore, these facts must be deemed to be admitted. See Kuehne & Nagel, Inc. v. Baiden, 36 NY2d 539, 544 (1975). See also Siegel, New York Practice (2d ed.) §281 (1991).

out its primary activities that entitle it to an exemption. See Petition Exhibit C, ¶20.

The City Assessor properly concedes that an organization's ancillary non-exempt activities do not deprive an otherwise exempt organization of property tax exempt status. See Defendant's Brief, p. 13; Plaintiff's Brief, p.12, n.5. Accordingly, the GAGV's few social functions do not nullify its entitlement to a property tax exemption.

That the GAGV's exempt, non-social activities vastly outnumber its few social activities is evident from the uncontroverted Record. The overwhelming majority of the GAGV's activities are community education services, counseling and support services, and the promotion of the rights of lesbians and gay men. See Petition Exhibits C, D, G; Plaintiff's Affirmation, ¶13-14; Supplemental Exhibit 14; Plaintiff's Brief, pp. 2-3, 8-9. Over the last several months, for example, activities that the GAGV conducted or sponsored include several workshops on various aspects of racism within the Rochester community; safer sex workshops; speaking engagements on the topics of homosexuality and homophobia before various university and medical school classes; speaking engagements with patients at the DePaul Mental Health Clinics in Rochester at the request of professional staff; quilting workshops for friends and families of persons who died of AIDS to sew AIDS Quilt panels; and regular meetings for persons working to develop domestic partnership legislation for Rochester. See Supplemental Exhibit 14. The GAGV charges no money for these or any other activities it

conducts or sponsors, except for its essential fundraising activities. See Supplemental Exhibit 14, ¶22; Petition Exhibit C, ¶13. All of these functions and activities directly relate to the stated GAGV's purposes.

Given the uncontroverted Record, it is nothing short of dishonest to characterize the GAGV as a "social and recreational" organization.[6] Unlike Valeria Home, the GAGV does not operate a resort hotel. Unlike the University Club, the GAGV does not have, as its primary function, the operation of a dining room and athletic club facilities. See Supplemental Exhibit 15. Unlike the Masonic Temple, the GAGV is not a fraternal organization whose main function is the fraternization of its membership.

Finally, the City Assessor's fallacious depiction of the GAGV as a "social and recreational" club flatly contradicts his admissions that the GAGV uses its building "in furtherance of the GAGV's corporate purposes"; and "that the GAGV is a bona-fide not-for-profit organization which performs a worthwhile community service." Defendant's Brief, p. 2. The Record clearly demonstrates that the City Assessor's admissions are correct, and that the GAGV is radically different than a "social or recreational" organization.

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[6] Given that the Presbyterian Residence Center was denied a property tax exemption because its purpose and functions were no different than a commercial apartment complex, see Presbyterian Residence Center Corp. v. Wagner, 66 AD2d at 999, the City Assessor's description of the Presbyterian Residence Center as a "social and recreational organization" is simply untrue. Defendant's Brief, p. 12.

III. THE CITY ASSESSOR'S IMPOSITION OF ADDITIONAL CRITERIA ON THE GAGV'S REQUEST FOR A PROPERTY TAX EXEMPTION IS ILLEGAL.

The Court of Appeals has emphasized that only the Legislature has the authority to limit the "broad category of charitable, educational, or mental or moral improvement of man purposes" which qualify an organization for a property tax exemption. Mohonk Trust, 47 NY2d at 485. Nevertheless, in his attempt to justify his illegal and discriminatory denial of the GAGV's request for a property tax exemption, the City Assessor has invented several restrictions under the RPTL §420-a that only the Legislature has the authority to create.

The City Assessor first attempted to limit an organization's entitlement to a property tax exemption to the exempt category it checks on its application. See Exhibit 13, ¶¶5-10. The City Assessor now withdraws that assertion. See Defendant's Brief, p. 1.[7]

Next, the City Assessor contrived an "advocacy" restriction, arguing that a property tax exemption is available only to non-advocacy organizations. See Exhibit 10. There is no legal authority that supports the City Assessor's pronouncement that such a limitation exists. Further, contrary to his stated position, the Record demonstrates overwhelmingly that the City Assessor routinely grants property tax exemptions to organizations that have primarily advocacy purposes and functions. See Plaintiff's Brief, pp. 17-20.

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[7] Under applicable authority, defendant's retention of this defense would have been patently frivolous. See Kahal Bnei v. Fallsburg, 78 NY2d 194, 203-04 (1991).

In fact, since at least as early as 1987, the City Assessor has never denied a property tax exemption to any organization because it is has an "advocacy" purpose or function, other than the GAGV. See Supplemental Exhibits 16, 17, and 18. [8]

Confronted with this graphic evidence that demonstrates that his purported "advocacy" restriction is bogus at best, he has now grafted three more post hoc restrictions into RPTL §420-a.[9] First, he argues that an organization's primary "advocacy" purpose and activities do not disqualify an organization from property tax exempt status so long as the "advocacy" organization receives government grants. See Jacobs Affidavit, ¶11. Given the professed significance of this new additional limitation, it is noteworthy that the City Assessor has never asked the GAGV whether it has ever received grants. Had he asked, he would have learned that within

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[8] The City Assessor states in his affidavit that he has denied other organizations property tax exemptions. Jacobs Affidavit, ¶12. For the reasons listed in Plaintiff's Brief and Reply Brief, none of the specified organizations that was denied property tax exemptions are at all similar in purpose or function to the GAGV. Moreover, the City Assessor neither asserts that he has denied property tax exemptions to other organizations on account of their advocacy functions, nor denies that the GAGV is the only organization denied a property tax exemption on account of its advocacy functions.

[9] The City Assessor asserts new rationalizations for his denial of the GAGV's request for a property tax exemption for the first time in this litigation; he never gave these reasons to the GAGV at any point in the administrative process. Post-hoc justifications like those asserted here are entitled to no evidentiary weight, and, especially when discriminatory treatment is alleged, should be viewed with extreme skepticism. See Bowen v. Georgetown University Hospital. 488 U.S. 204, 212, 109 S.Ct. 468, 473-74 (1988); Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 940 (2d Cir. 1988); 303 West 42nd Street Corp. v. Klein, 46 NY2d 686, 697 (1979).

the last year, the GAGV received three state grants, and receives funding through the United Way. See Supplemental Exhibit 14, ¶¶ 24-27.

Regardless, there is no language in the statute, let alone any case law that suggests that the receipt of governmental grants is an essential prerequisite for a property tax exemption to any organization, let alone one that has an advocacy purpose and/or function.

Second, he argues that the "charitable" organization exemption is limited to organizations with only financially impoverished intended beneficiaries. Plaintiff has sufficiently refuted this supposed restriction above. Furthermore, the Record reveals yet again that the City Assessor's actions belie his excuses. The Regional Council on Aging's By-Laws specifically targets both the "well elderly" and the "frail elderly" who are living independently or interdependently as the intended beneficiaries of its services and advocacy activities. Exhibit 4, p. 1. Nowhere in the Council's By-Laws is there any indication that it gears its activities to financially needy elderly groups.[10] Nonetheless, despite his ostensible "low income beneficiaries" prerequisite, the City Assessor granted a property tax exemption to the Regional

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[10] Significantly, while the City Assessor makes a point of stating that Group 14621 Community Association and the 19th Ward Association received government grants for programs targeted to low-income groups, the government grants received by the Regional Council on Aging are apparently not similarly targeted to low-income groups, but rather to "various segments of the elderly population in Monroe County and the surrounding area." Jacobs Affidavit, ¶11.

Council on Aging.

Finally, for purposes of this litigation, the City Assessor has concocted a "self-help" restriction, declaring that an organization that serves only the special needs of a specified group who are also its members cannot be classified as a charitable organization. See Defendant's Brief, pp. 8-9. Considering that the 19th Ward Community Association is, like the GAGV, a membership organization comprised of members who are residents of the area served by the Association, and to whom the Association targets its activities, the City Assessor's "self-help" restriction apparently applies only to the GAGV.

In any event, the undisputed Record makes it clear that the GAGV does not target its activities solely to its membership. Among its primary purposes and activities is the education of the general public about homosexuality and the rights of lesbians and gay men. See Plaintiff's Affirmation, ¶¶13-14; Petition Exhibit A, ¶6; Petition Exhibit C, ¶¶5, 7, 9, 10, 16, 17, 18. It is also clear from the Record that virtually all of the GAGV's activities are open to the general public. See, e.g., Petition Exhibit C; Supplemental Exhibit 14. Finally, like the City Assessor's "needy persons" and "receipt of government grants" restrictions, his self-imposed "self-help" restriction has no basis in either the statute itself or in applicable case law.

It is obviously the City Assessor's desire to deny a property tax exemption to the GAGV. He does not, however, have the option of imposing additional restrictions on the GAGV's right to a

property tax exemption that do not exist under RPTL §420-a. On the contrary, as the New York City Assessor properly did with respect to the Lesbian and Gay Community Services Center, Inc.,[11] and as the Albany City Assessor properly did with respect to the Capital District Lesbian and Gay Community Council, Inc.,[12] defendant's only lawful option is to grant the GAGV a property tax exemption because the GAGV is entitled to one under RPTL §420-a.

IV. THE GAGV IS ENTITLED TO SUMMARY JUDGMENT ON ITS CONSTITUTIONAL EQUAL PROTECTION CLAIMS.

In its Complaint and Motion for Summary Judgment, the GAGV alleges that the City Assessor's denial of its request for a property tax exemption violates the GAGV's federal and state constitutional rights to equal protection under law. See Motion

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[11] In his Brief, the City Assessor questions the legitimacy of plaintiff's assertion that the Lesbian and Gay Community Services Center in New York City was granted a property tax exemption pursuant to RPTL §420-a. See Defendant's Brief, p. 10. As noted in footnote 5, however, a party's factual assertions must be deemed admitted in the context of a summary judgment motion unless the other party submits facts to the contrary.

Without any factual basis, the City Assessor asserts that, "There may be special statutory provisions that apply in New York City." Defendant's Brief, p. 10. This bald assertion is contradicted by the President of the LGCSC who stated, under oath, that his organization was granted a property tax exemption under RPTL §420-a. See Motion Exhibit 7. The City Assessor simply has no legitimate basis to challenge the veracity of the LGCSC President. To the extent "special provisions" exist, the Record makes it clear that it is the City Assessor in Rochester, not the City Assessor in New York City, who has imposed special restrictions on the GAGV that are not permitted under law.

[12] See Supplemental Exhibits 19 and 20.

Exhibit 1, ¶¶32-38. The City Assessor has raised three defenses to the GAGV's equal protection claims, none of which has merit.

First, as plaintiff predicted (see Plaintiff's Brief, p. 21 n.9), the City Assessor maintains that he denied the GAGV tax exemption for only legitimate, nondiscriminatory reasons. See Jacobs Affidavit, ¶9. However, the GAGV has more than amply demonstrated that the circumstantial undisputed evidence in the Record shows otherwise. See Plaintiff's Brief, pp. 16-26, and cases cited therein. That the City Assessor's persistent refusal to grant a property tax exemption to the GAGV violates the GAGV's equal protection rights is further evidenced by the City Assessor's repeated and post hoc attempts to require the GAGV to satisfy new criteria that he has not required other organizations to satisfy.

The City Assessor's additional two objections are completely devoid of merit. He argues first that to assert its federal constitutional equal protection claim, the GAGV must allege that defendant acted under a state or local "statute, ordinance, regulation, custom or usage" when he allegedly violated the constitutional rights, and that the GAGV has failed to do so. 42 U.S.C. §1983. See Defendant's Brief, pp. 16, 17. Contrary to defendant's assertion, the undisputed facts more than adequately demonstrate that the City Assessor acted under color of state law when he denied the GAGV's request for a property tax exemption.

All that is necessary to fulfill this "acting under color of state or local law" requirement is a showing that "a public

employee act[ed] in his official capacity or while exercising his responsibilities pursuant to state [or local] law." West v. Atkins, 487 U.S. 42, 108 S. Ct. 2250, 2256 (1988). As the Rochester City Assessor, defendant is a public employee. He acknowledges, and surely does not dispute, that he was acting in his official capacity and was exercising his official responsibilities when he denied the GAGV's request for a property tax exemption under RPTL §420-a. Jacobs Affidavit, ¶¶4, 8, 9. Thus, the GAGV has fully met its obligation to demonstrate that the City Assessor was acting under color of state or local law when he denied the GAGV's property tax exemption request.

Second, the City Assessor argues that to raise its federal constitutional claims, the GAGV must allege a "'custom or usage' of discrimination against gay persons or organizations" by the City Assessor. Defendant's Brief, p. 18. This proposition is simply wrong, and the cases cited by defendant do not stand for such a proposition.

When a plaintiff sues a municipality for the violation of his or her federal constitutional rights, the plaintiff must demonstrate that the municipality's action implements a municipal policy or custom. See Monell v. Department of Social Services, 436 U.S. 658 (1978). Here, however, the GAGV has not sued the City of Rochester, but rather the City Assessor in his capacity as a public official who is charged with implementing a state law. As such, the GAGV is entitled to sue the City Assessor for prospective injunctive relief to enforce its federal constitutional rights

without having to show that the City Assessor violated its rights pursuant to an official policy or custom. See Chaloux v. Killeen, 886 F.2d 247, 250-51 (9th Cir. 1989); Schloss v. Bouse, 876 F.2d 287, 292 (2d Cir. 1989); Heimbach v. Village of Lyons, 597 F.2d 344, 346 (2d. Cir. 1979). See also cases cited in Plaintiff's Brief, pp. 22-23, in which municipal officers and agencies were enjoined from violating plaintiff's constitutional rights, without a showing that the municipal officer or agency acted pursuant to an official policy or custom.

The undisputed facts in the Record, coupled with applicable case law, reveal overwhelmingly that the City Assessor's denial of a property tax exemption to the GAGV violates its federal and constitutional right to equal protection under law. The GAGV is therefore entitled to summary judgment and injunctive relief against the City Assessor on this claim.

V. PLAINTIFF'S MOTION TO AMEND ITS COMPLAINT, WHICH SHOULD BE GRANTED, SHOULD NOT DELAY THIS COURT'S DECISION ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT.

Acknowledging that leave to amend a pleading should be freely granted, the City Assessor does not assert that he would be prejudiced in any way should the GAGV's Motion to Amend its Complaint be granted. In the absence of prejudice or unfair advantage, leave to amend should be permitted. See Thompson v. Alleva, 76 AD2d 1022, 429 NYS2d 481 (3rd Dep't 1980)(citing Siegel, New York Practice §237). Where the facts remain the same and only a legal theory is changed or expanded, as is the case here, "well-

reasoned law permits the amendment," even on the eve of trial. Rife v. Union College, 30 AD2d 504, 505, 294 NYS2d 460 (3rd Dep't 1968).

The City Assessor's only objection to plaintiff's Motion to Amend its Complaint is that its Section 1983 "claim" is without merit. In making this objection, the City Assessor reveals his complete misunderstanding of plaintiff's constitutional claims, as well as the nature of 42 U.S.C. §1983.

Defendant frequently refers to plaintiff's "claims under 42 U.S.C.A. section 1983." Defendant's Brief, p. 15. See also Defendant's Brief pp. 16-19. Contrary to defendant's understanding of its claims, the GAGV raises no substantive claims, new or otherwise, under 42 U.S.C. §1983. Plaintiff raises no "Section 1983 claims" because 42 U.S.C. §1983 creates no substantive rights. Rather, it only acts as the statutory vehicle for enforcing a plaintiff's federal constitutional and legal rights in state and federal courts. See Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 617, 99 S. Ct. 1905, 1915-16 (1979). As the GAGV has amply demonstrated, the City Assessor has violated its substantive federal constitutional right to equal protection.

Defendant's misconception of the nature of 42 U.S.C. §1983 apparently leads it to the erroneous conclusion that plaintiff's Motion to Amend its Complaint precludes it from simultaneously moving for summary judgment on its federal constitutional claims. Plaintiff's proposed Amended Complaint raises no new facts and no new areas of legal dispute. The GAGV's original Complaint pleads

two separate substantive claims for relief. First, as the City Assessor acknowledges, the GAGV's original Complaint claims that the purposes and functions of the GAGV and its Community Center meet the requirements for a property tax exemption under RPTL §420-a. See Motion Exhibit, ¶¶28-31.

Second, in its original Complaint, the GAGV properly alleged substantive claims for relief under the state and federal constitutional equal protection clauses. See Motion Exhibit, ¶¶32-38. Having already pleaded that the City Assessor's action denied the GAGV its right to equal protection under the federal Constitution, the GAGV's Amended Complaint would only clarify that those constitutional rights are made enforceable by 42 USC §1983. Additionally, the Amended Complaint would clarify that the fundamental right that results in a "strict scrutiny" test for plaintiff's equal protection claims is the GAGV's message and membership, thus interfacing with the GAGV's overlapping constitutional rights to free speech and freedom of association.

Having moved for leave to amend its original complaint to incorporate specific enforcement vehicle statutes and to more carefully delineate the constitutional claims it raised in its original Complaint, the GAGV is in the same procedural posture as the plaintiff was in Rife v. Union College, 30 AD2d 504, 294 N.Y.S.2d 460 (3rd Dep't 1968). In that case, the Third Department held that it was proper for the trial court to permit the plaintiff to amend the complaint the day before trial to include the specific labor laws and rules violated by defendant where the original

complaint had contained only a general reference to such laws. Although not explicitly stated, the holding in Rife also stands for the proposition that the trial can proceed even where the complaint has been amended on the eve of trial, at least in instances where the amendment merely expands upon and clarifies the causes of action already contained in the original complaint.

Plaintiff's procedural posture in Rife is indistinguishable from that in the instant action. The City Assessor has had more than sufficient opportunity to respond to plaintiff's federal (and state, for that matter) constitutional claims. In fact, by denying that his actions are discriminatory, and by presenting legal defenses, the City Assessor has already responded to the GAGV's constitutional claims. Moreover, as he has indicated in his response to plaintiff's Motion for Summary Judgment, he would continue to deny all aspects of plaintiff's expanded and clarified equal protection claim if given a further opportunity to do so. Thus, the City Assessor's assertion that he needs time to "answer" is spurious. Just as trial court would have proceeded in Rife, this court should proceed with plaintiff's Motion for Summary Judgment. Under the circumstances of this case, plaintiff's simultaneously filed Motion to Amend provides no legitimate basis for this court to delay its consideration of plaintiff's Motion for Summary Judgment.

VI. CONCLUSION

For the foregoing reasons, plaintiff's Motions to Amend its

Complaint and for Summary Judgment should be granted, and defendant's Cross-Motion for Summary Judgment should be denied.

Respectfully submitted,

Dated: November 17, 1992

ELLEN M. YACKNIN, ESQ.
80 Highland Avenue
Rochester, NY 14620
(716) 256-0508
day: 454-6500

SUSAN ANN SILVERSTEIN, ESQ.
139 Burlington Ave.
Rochester, NY 14619
(716) 464-9555
day: 325-2520

Attorneys for Plaintiff

TO: LOUIS N. KASH, Corporation Counsel
SUSAN L. HAUSER, Municipal Attorney
400A City Hall, 30 Church Street
Rochester, NY 14614
(716) 428-6764